Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

RICHARD E. BACHTEL; RICHARD G. MILHAM; PRADO PETROLEUM CO.; SANTA FE INTERNATIONAL CORPORATION; SANTA ANA VALLEY IRRIGATION COMPANY; DONALD C. WINKLER; ROSS O. NELSON; PARA LOS NINOS; PLAZA DE LA RAZA; UNIVERSITY OF SOUTHERN CALIFORNIA,

Petitioners

v.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERRED IN SUSTAINING THE LOWER COURT'S GRANTING OF THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT IN PETITIONERS' "TAKING ACTION" RESULTING FROM INCREASED INUNDATION OF PETITIONERS' OIL AND GAS WELLS WHERE THE COURT OF APPEALS FOUND THAT A KEY FEDERAL FLOWAGE EASEMENT WAS, "ARGUABLY LIMITED IN PURPOSE," WHERE THERE EXISTED DISPUTED FACTUAL ISSUES, AND WHERE THE COURT OF APPEALS FOUND CERTAIN FACTS IN ARRIVING AT ITS OPINION WHICH THE GOVERNMENT, IN RESPONSE TO PETITIONERS' PETITION FOR REHEARING, ADMITTED WERE IN ERROR.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Federal Circuit.

The Petitioners who are corporations who have no parent companies or nonwholly owned subsidiaries are SANTA ANA VALLEY IRRIGATION COMPANY, PARA LOS NINOS, A California Nonprofit Corporation, PLAZA DE LA RAZA, A California Nonprofit Corporation, and UNIVERSITY OF SOUTHERN CALIFORNIA, A California Nonprofit Corporation.

Petitioner SANTA FE INTERNATIONAL CORPORATION has changed its name to SANTA FE (U.S. HOLDINGS INC.). The name of its parent company is K.P.C. (U.S. HOLDINGS INC.), a Delaware corporation. SANTA FE has no active nonwholly owned subsidiaries.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

RICHARD E. BACHTEL; RICHARD G. MILHAM; PRADO PETROLEUM CO.; SANTA FE INTERNATIONAL CORPORATION; SANTA ANA VALLEY IRRIGATION COMPANY; DONALD C. WINKLER; ROSS O. NELSON; PARA LOS NINOS; PLAZA DE LA RAZA; UNIVERSITY OF SOUTHERN CALIFORNIA,

Petitioners

v.

THE UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners, RICHARD E. BACHTEL, RICHARD G. MILHAM, PRADO PETROLEUM CO., SANTA FE INTERNATIONAL CORPORATION, SANTA ANA VALLEY IRRIGATION COMPANY, DONALD C. WINKLER, ROSS O. NELSON, PARA LOS NINOS, PLAZA DE LA RAZA, and UNIVERSITY OF SOUTHERN CALIFORNIA, respectfully pray that

a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in the above-entitled case on October 6, 1993.

OPINIONS BELOW

The October 6, 1993, Opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unpublished. The Court of Appeals issued its Opinion on October 6, 1993, and issued its Order denying Petitioners' Combined Petition for Rehearing and Suggestion for Rehearing In Banc on December 16, 1993. The Court of Appeals issued its Judgment as a mandate on December 23, 1993. United States Court of Appeals for the Federal Circuit case number 93-5070. The Opinion, Order and Judgment are reprinted in the Appendix to this Petition, pp. 37, 51 and 54.

The Judgment of the United States Court of Federal Claims was entered on November 25, 1992, pursuant to its Opinion issued on November 23, 1992, in case number 674-88 L, which Judgment and Opinion were unpublished and are reprinted in the Appendix to this Petition, pp. 56 and 57.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on October 6, 1993.

Petitioners filed a Combined Petition for Rehearing and Suggestion for Rehearing In Banc on October 20, 1993. The Court of Appeals invited a response by the UNITED STATES which was filed on November 22, 1993. On December 16, 1993, the Court of Appeals issued its Order denying the Petition for Rehearing and declining the suggestion for rehearing in banc. On December 23, 1993, the Court of Appeals issued its mandate.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Amendment V to the United States Constitution which relevant portion is as follows:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 56, Federal Rules of Civil Procedure, which relevant portion is as follows:

> (a) . . .
>
> **(b) For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a

summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone

although there is a genuine issue as to the amount of damages.

(d) . . .

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) . . .

(g) . . .

(Amended August 1, 1987.)

STATEMENT OF THE CASE

In November of 1988 Petitioners, and then plaintiff David Murdoch dba Pacific American Oil Company, filed their Complaint for Damages and Breach of Contract in the United States Court of Federal Claims which Complaint was subsequently amended. The action was brought under the Tucker Act [28 U.S.C. § 1491] for damages resulting from the alleged "taking" of their property by the UNITED STATES [U.S. Army Corps of Engineer].

On or about October 4, 1991, the UNITED STATES filed a Motion for Summary Judgment. On or about December 9, 1991, Petitioners filed their Reply to the Motion for Summary Judgment. Various additional declarations and responses were filed by leave of court, oral argument was made via telephone on August 11, 1992, and on November 23, 1992, the court granted the Motion of the UNITED STATES for Summary Judgment.

1. PRADO DAM, THE SARDCO PROPERTY AND RULINGS BELOW

Prado Dam (referred to as "Prado Dam" or "Dam") was constructed by the United States in the late 1930's as a single purpose dam to protect Metropolitan Orange County from the infrequent floods that affect Southern California. The basin behind the Dam was designed to function only as a flood control basin during the rainy season. The Dam contained two unsealed outlets which would preclude any long term water retention in the basin. Since the flood control basin was to be rarely used, the landowners of the basin were not restricted by the UNITED STATES as a result of its 1944 condemnation proceeding from conducting farming and other commercial ventures within the basin. Because they were not restricted, the landowners received smaller compensation for the limited flowage easement which was obtained by the UNITED

STATES. This limited flowage easement affected property known as the SARDCO Property which is a portion of the property that is the subject of Petitioners' "taking" action.

Petitioners include, in part, the landowners of the basin or their successors in interest. Petitioner PRADO PETROLEUM CO. ("PRADO PETROLEUM" or "PRADO") acquired its oil and gas interest and rights to surface entry in the basin through a lease of the SARDCO Property. The lease is called the SARDCO Lease.

In 1967, the SARDCO Property became the subject of a Stipulation and Condemnation Order ("Condemnation Award") entered into between the Orange County Water District ("OCWD") and those Petitioners (or their predecessors in interest) who owned the SARDCO Property as well as other third parties. OCWD sought to acquire certain upstream rights so that the water flow to

its downstream settling ponds would not be curtailed. Contrary to the findings of the Court of Appeals in affirming the summary judgment, OCWD did not acquire the right to flood the basin [which limited right to flood was possessed by the UNITED STATES]. Contrary to the findings of the Court of Appeals, the landowners of the SARDCO Property also reserved and excepted from the Condemnation Award certain surface rights and the right to develop, produce and remove oil and gas from the basin.

Specifically, OCWD and the parties stipulated that the SARDCO Property and Leasehold would be excepted from the Condemnation Award to the extent of the oil and gas rights on the leasehold:

> and the right of prospecting for, the exploration, development, production, extraction and taking of said oil, gas, petroleum and other hydrocarbon substances from

said land.

Surface rights were retained:

> for road access or ingress and egress to and from said drilling areas or islands and for pipelines to and from the same.

The Condemnation Award also stated that nothing in it:

> shall be deemed to prohibit such exploration, development, production or extraction from natural surface levels within said drilling areas or islands.

The retained rights with respect to the SARDCO Leasehold and Property were excluded from the "water conservation" aspects of the Condemnation Award, an exclusion which was overlooked by the Court of Appeals in concluding that there was no "taking" with respect to the SARDCO Leasehold because of its adoption of the UNITED STATES' erroneous argument that the "water conservation"

language allowed OCWD to flood the basin at will.

The Court of Appeals' incorrectly believed in sustaining the lower court's granting of the UNITED STATES' motion for summary judgment that none of Petitioners had acquired their rights under the SARDCO Lease until 1982 (which arguably effected its decision as to whether the parol evidence rule barred evidence as to the "intent of the parties" in their Stipulation and Condemnation Award).

The Court of Appeals' finding that the Condemnation was:

> specifically for the purpose of retaining water within the basin for water conservation purposes

was not only contrary to the Condemnation Award itself but it was contrary to the physical condition of the Dam in 1967 and the intent of the original parties to the Condemnation Award. As to the physical

condition of the Dam, water could not be "retained" behind the Dam for any extended period because one of the unsealed outlets remained open until 1969.

2. THE FEDERAL LEASE AND RULINGS BELOW

The UNITED STATES is also a landowner of a part of the land behind the Prado Dam and in 1965 it leased to Petitioner DONALD C. WINKLER ("WINKLER") its interest behind the Dam for the purpose of drilling and operating oil and gas wells. The lease ("Federal Lease") provides that:

> all rights under this lease are subordinate to the rights of the United States to flood and submerge the lands, permanently or intermittently in connection with the operation and maintenance of the Prado Flood Control Basin Project. (Emphasis added).

It also contains a hold-harmless clause which required the lessee to indemnify the

UNITED STATES for injury resulting from flooding and other causes.

In 1965, when the Federal Lease was entered into, and prior to the development of any oil and gas wells, the area behind Prado Dam was used for farming, for recreation, and for other uses that were incompatible with the storage of water behind the Dam. Petitioner WINKLER, the lessee, intended to construct the oil and gas wells at elevation 490 and was informed, prior to entering into the lease, that there had not been any water behind the Dam for years. The records of the UNITED STATES show that prior to 1965, the water level reached above elevation 490 only once, in 1943. The Dam itself had a permanent opening that effectively precluded any long term storage behind the Dam and another opening that had been sealed in 1946 was sealed only because Orange County had indemnified the UNITED STATES for any injury

to it or any third person. When the second opening was sealed in 1969, Orange County again agreed to indemnify the UNITED STATES for any injury to it or any third person resulting from such closing.

Between 1965 and 1978, the water level rarely exceeded 490 except for 1969 when there was a tremendous storm. The average number of days per year prior to 1978 when water reached above elevation 490 was 3 days. After 1978 and through 1991, water was retained behind the Dam for an average of 92 days per year due, at first, to a claimed upstream problem behind the Dam and then due to the requests of the Orange County Water District to the Government to store water in the Prado Dam for other than flood and related maintenance purposes. This retention during the off-season was even occurring in years of Southern California's longest drought (which ended in 1993).

In 1982, Petitioner PRADO PETROLEUM acquired the working interest in the oil and gas operations on both the Federal Leasehold and SARDCO Property that had been temporarily halted because of the purported upstream difficulties above Prado Dam. PRADO PETROLEUM purchased the interest for cash of $387,500 and agreed to pay royalty payments to the remaining Petitioners who included original participants to the 1965 Federal Lease and 1967 SARDCO Lease. PRADO PETROLEUM then began repairing and replacing oil and gas wells at a cost in an amount of approximately Two Million Dollars under the auspices of the Army Corps of Engineers.

Shortly after the repairs and capital improvements were made by PRADO PETROLEUM, the UNITED STATES through the Army Corps of Engineers, began to change its policy from one where it would quickly discharge the storm water behind Prado Dam (except for the upstream difficulties in period 1978--1981)

to a policy of retaining water behind Prado Dam for long periods of time so that the OCWD could absorb it into its downstream percolation fields (settling ponds) and resell it to its customers for millions of dollars.

The long term retention of water both on the Federal Leasehold and SARDCO Leasehold effectively destroyed the commercial value of Petitioners' leasehold interests and royalty rights. The change in policy also destroyed the ability of Petitioner PRADO PETROLEUM to obtain financing either for the repair of existing oil and gas wells, or the building of new oil and gas wells because the use of the basin changed from a single use to a combined use where the basin would be used both for long term storage to meet the water needs of Orange County and for flood control purposes.

Because of the indemnification language in the Federal Lease, the Court of Appeals determined that there could be no taking and refused to consider the circumstances when the Federal Lease was entered into by Petitioner WINKLER and the UNITED STATES.

REASONS FOR GRANTING THE WRIT

The Judgment of the United States Court of Appeals for the Federal Circuit should be reviewed by this Court because in sustaining the Motion for Summary Judgment, the Court of Appeals both departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court. The Judgment should be reviewed because it is also in conflict with decisions of this Court and other Courts of Appeals.

The Court of Appeals became a, "trier of fact" rather than a determiner of whether there were issues of fact to be resolved by the fact finder at the time of trial. It refused to apply the rules of evidence developed by this Court and other Courts of Appeals in ruling upon motions for summary judgment. For example, it did not apply the rule that the evidence must be viewed in the

light most favorable to the non-moving party.

Petitioners assert that these departures require the exercise of this Court's power of supervision because both the Court of Appeals and the lower court have deprived the Petitioners of their right to trial of the issues and their right to due process.

As an additional basis for review, the Judgment of the Court of Appeals conflicts with decisions of this Court and other Courts of Appeals with respect to the application of rules of law to summary proceedings as well as to what law applies. It [impliedly] refused to apply California law in ascertaining the meaning of the OCWD's Condemnation Award, a refusal which violates the Erie R. Co. v. Tompkins principle, 304 U.S. 64 (1938).

This case involved hundreds of pages of exhibits and numerous declarations. The

declarations included the declarations of those Petitioners who were principals or parties to the original Federal Lease and principals with respect to the negotiations leading up to the OCWD Condemnation Award. The UNITED STATES obtained no declaration of any OCWD representative, or any other third party who negotiated the Condemnation Award to rebut the declarations of the Petitioners. There was no declaration produced by the UNITED STATES to rebut the declarations submitted by the Petitioners as to the circumstances leading up to the signing of the Federal Lease, or the use of the Dam at the time of the signing of the Federal Lease. As to the Petitioners' declaration supported contention that the "water conservation" language in the Condemnation Award did not apply to the reserved oil and gas lease rights and surface entry and had reference to the flowage of water downstream to OCWD's

settling ponds, the Court of Appeals provided no explanation why the Petitioners' understanding of the language was untenable as a matter of law, or why the language applied to reserved rights that were "excepted" from the transfer of rights to OCWD as a result of the Condemnation Award.

In violation of this Court's requirement under Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), the Court of Appeals attempted to resolve disputed issues of fact:

> rather than to see if there are issues of fact to be resolved by the factfinder at trial.

Consarc Corp. v. Marine Midland Bank, N.A., 996 F. 2d 568 (2nd Cir. 1993). It even resolved factual disputes based simply upon the argument of the UNITED STATES and not on any evidence. For example, it found as a material fact that Petitioners, "acquired their rights under the SARDCO lease in

1982." The Petitioners included parties who had reserved and excepted rights under the condemnation decree and who were lessors of the SARDCO Lease executed in 1967.

> The Court of Appeals found that:
>
> the Condemnation Order unambiguously transferred to Orange County 'all title to the surface rights.'

This "finding" was contrary to the limiting language in the Condemnation Award itself, the laws of California and the declarations of two of the original participants to the Condemnation Award.

These findings of the Court of Appeals are in disregard of summary judgment evidentiary rules which require the lower court [and Court of Appeals] to:

> view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor.

Consarc Corp, 996 F. 2d at 572.

> Where reasonable minds could be said to differ because the language the parties used in their written contract is susceptible to more than one meaning--each as reasonable as the other--and where extrinsic evidence of the parties' actual intent exists, it should be submitted to the trier of fact.

Consarc Corp., 996 F. 2d at 573. "Water conservation" is susceptible to more than one meaning especially in light of the physical condition of the Dam when the Condemnation Award was entered into. Extrinsic evidence of the parties' actual intent exists and it should be submitted to the trier of fact.

Even if Petitioners had only introduced, at a minimum, some extrinsic evidence that supported their position, summary

judgment would have been inappropriate. Consarc Corp., 996 F. 2d at 574. Petitioners produced substantial extrinsic evidence that supported their position including the Condemnation Award itself.

Neither the Court of Appeals nor the lower Court looked to the, "time of contracting" in determining the meaning of the language in the Federal Lease or Stipulation and Condemnation Award. Both of the courts adopted the argument of the Government as to the meaning of all of the terms rather than an, at least, equally reasonable meaning asserted by Petitioners who included parties to the original agreements or decrees.

> Fact finders examining intent are instructed to look to the time of contracting. [Cases cited.] In so doing, they must consider the objective intentions of the parties manifested at that time.

[Case cited].

Consarc Corp., 996 F. 2d at 576. Neither the lower court nor the Court of Appeals examined the objective intentions of the parties manifested at the time.

The UNITED STATES in its response to Petitioners' Petition for Rehearing admitted that some of "the factual" findings of the Court of Appeals were erroneous but asserted, in part, that the Petitioners were advancing new arguments concerning Petitioners' reservation of rights with respect to the Condemnation Award. To the contrary, the Court of Appeals based its findings upon the Government's argument that the Condemnation Award essentially eliminated all surface rights and gave OCWD the right to flood, "at will."

Disputes as to the meaning of language cannot be resolved by summary judgment when the meaning depends upon the interpretation of ambiguous documents which can be

illuminated by oral testimony. Banque Paribas v. Hamilton Industries Intern., 767 F. 2d 380, 383 (7th Cir. 1985). This principle was disregarded by the Court of Appeals.

The Judgment of the Court of Appeals is so broad and the findings of "fact" so precise, it is probable that the decision will also have the effect of depriving Petitioners of any claim as against the OCWD even though there was no evidence adduced by the UNITED STATES as to the meaning of the language when the Condemnation Award was entered or when the SARDCO Lease was executed.

On its face, summary judgment was not available because neither the Federal Lease nor the Condemnation Award were wholly unambiguous. Mycak v. Honeywell, Inc., 953 F. 2d 798 (2d Cir. 1992).

The Court of Appeals also failed to follow the Supreme Court's directive as to

what law applies when a Federal Court is considering an issue of State law. See, Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Alternatively, the Court overlooked or misapprehended California law with respect to its conclusion that, "the unambiguous language of the Condemnation Order transferred to Orange County all title to the surface rights." Pursuant to section 1105 of the California Civil Code:

> A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended. (Emphasis added).

The "grant" to OCWD in the Condemnation Award by the landowners was limited because they excluded from the grant certain of the surface rights, the mineral rights, and the right of ingress and egress delineated in the Stipulation which was incorporated into

the Condemnation Award.

The Court of Appeals overlooked or misapprehended California law and federal law in determining that OCWD (along with the Government) has the right to flood the land where the oil and gas wells are operating. There is no condemnation award or order which ever gave OCWD the right to flood the reserved and excepted interests. Under California law, OCWD has a mandatory duty to prevent flooding as well as to avoid wasting water. Salton Bay Marina, Inc. v. Imperial Irrigation Dist., 172 Cal. App. 3d 914, 939--940, 218 Cal. Rptr. 839 (1985). Additional protection is granted under California law to oil and gas property. Section 3300, California Public Resources Code. Even if OCWD could flood the land, it is obligated under California law to condemn and pay compensation for the appropriate flooding easement. Salton Bay Marina, 172 Cal. App. 3d at 937--939. OCWD could have condemned

the entire property. OCWD elected to reduce its outlay of cash by limiting what it was condemning.

The UNITED STATES and not OCWD was granted a [limited] flowage easement in 1944. OCWD acquired no right to "flood" as a result of the 1967 Condemnation Award.

The Court of Appeals overlooked or misapprehended California law as to the surface rights of an oil and gas lessee, law that it was bound to apply. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Petitioner PRADO PETROLEUM is the assignee of the lessee's interest under the SARDCO Lease. The SARDCO Lease provides for surface rights as set forth in the Lease itself and the Stipulation and Condemnation Award. As stated by the California Supreme Court in Callahan v. Martin, 3 Cal. 2d 110, 122 (1935):

> Under the usual oil and gas lease, the owner-lessor transfers

> to his lessee his right to drill for and produce oil and other substances. . . . If the oil and gas lessee is not granted exclusive possession of the surface by the terms of the lease, he has nevertheless a right to such possession as is necessary and convenient for the exercise of the profit, which, in fact, may preclude any other surface possession. This profit *a prendre* vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real if it is to endure for years.

Summary Judgment was not properly granted because it involved the intent of parties to the Federal Lease and Condemnation Award and the language of both the Federal Lease and Condemnation Award was

not wholly unambiguous. Mycak v. Honeywell, Inc., 953 F. 2d 798 (2d Cir. 1992). The Court of Appeals failed to follow the directive of this Court in United States v. Seckinger, 397 U.S. 203, 212 (n. 17) (1970):

> Contract interpretation is largely an individualized process, with the conclusion in a particular case turning on the particular language used against the background of other indicia of the parties' intention. (Emphasis added.)

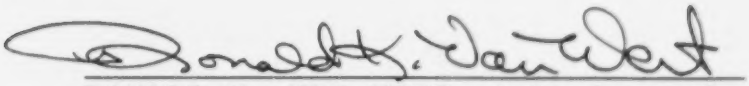
CONCLUSION

Petitioners were not afforded the evidentiary protections required when a summary judgment is sought. The Court of Appeals and lower court weighed evidence in violation of their responsibility to be an issue determiner. The laws of California were not applied in interpreting a state condemnation award as required by the Erie

principle.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,



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Dated: March 10, 1994

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED: OCTOBER 6, 1993

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment

should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCES X. GINDHART
Clerk

cc: RONALD K. VAN WERT
DAVID C. SHILTON
STEPHEN J. MEYER

BACHTEL V. US, 93-5070
(CFC - 674-88L)

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5070

RICHARD E. BACHTEL, RICHARD G. MILHAM, PRADO PETROLEUM CO., SANTA FE INTERNATIONAL CORPORATION; DONALD C. WINKLER, ROSS O. NELSON, PARA LOS NINOS; PLAZA DE LA RAZA; UNIVERSITY OF SOUTHERN CALIFORNIA,

and

SANTA ANA VALLEY IRRIGATION COMPANY,

Plaintiffs-Appellants,

v.

DAVID MURDOCH d/b/a/ PACIFIC AMERICAN OIL COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: October 6, 1993

Before NEWMAN, ARCHER, and MICHEL, Circuit Judges. MICHEL, Circuit Judge.

DECISION

Bachtel et al. ("Appellants") appeal the November 23, 1992 decision of the United States Court of Federal Claims (CFC), No. 674-88 L, granting summary judgment and dismissing appellants' breach of contract and takings claims under two lease agreements, the Federal Lease and the Santa Ana River Development Company (SARDCO) Lease. Because there are no material issues of fact and because appellants have not established under the unambiguous terms of either lease that they have a protectable property right which has been taken as a result of government caused flooding, we affirm.

DISCUSSION

Appellants are lessees of oil and gas rights in certain parcels of government land lying in the Prado Basin in California. The

land covered by both leases is subject to flooding as a result of operation of the Prado Dam, which the United States built pursuant to the Flood Control Act of 1936 to protect metropolitan Orange County, California, from flooding.

Appellants filed suit in the CFC alleging that the government changed its policy in operating the Prado Dam, by also using the dam for water conservation and storage purposes, rather than only for flood control. Appellants argued that this change in use increased the time during which the land was submerged, thereby putting a greater servitude on it than contemplated by the parties when they entered into each lease agreement, thus breaching the lease agreements and effectuating a taking. The government filed a motion for summary judgment.

In granting summary judgment, the CFC concluded that the Federal Lease was

unambiguous, thereby precluding the introduction of parol evidence as to the intent of the parties. The CFC concluded that the "subordination clause" of the Federal Lease explicitly gave the government the right to flood the land intermittently or permanently and that the "hold harmless" clause released the government from liability for damages resulting from flooding due to any government activity in connection with operation of the dam. With respect to the SARDCO lease, the CFC concluded that appellants did not raise a material factual issue regarding whether they had suffered greater flooding than that which would have been caused by the dam's anticipated operation, because appellants produced no specific evidence to contradict the government's evidentiary showing that appellants' wells were only submerged for sixteen percent of the time between August 1982 and July 1992.

I. The Federal Lease

On appeal, appellants argue that the Federal lease is ambiguous, because the "very operation of oil and gas wells is contrary to long term retention of water," and because the lease specifically refers to recreational use which is "inconsistent with the retention of water for other than flood control purposes." Appellants also argue that no language in the Federal Lease indicates the dam will be used for water conservation, and that the lease provision concerning "flooding in connection with the operation of the Prado Flood Control Basin Project" (emphasis added) creates an ambiguity regarding the operation of the dam contemplated by the parties in signing of the lease. Therefore, appellants argue that the CFC's reliance on Bistline v. United States, 640 F. 2d 1270 (Ct. Cl. 1981), to ban the introduction of parol evidence is misplaced because a material fact issue

exists as to whether the Prado Dam is being operated within the limits initially authorized by Congress.

The plain language subordinates all of appellants' rights under the lease to the government's right "to flood and submerge the lands, permanently or intermittently in connection with the operation and maintenance of the Prado Flood Control Basin Project." (emphasis added). In addition, the "hold harmless" clause exempts the United States from any liability "arising from or incident to the flooding of the said premises by the Government or flooding from any other cause, or arising from or incident to any other Governmental activities." (emphasis added). We find nothing ambiguous in this language.

That the lease grants appellants certain oil and gas rights and mentions concurrent recreational use of the land does not make either clause ambiguous. Although

no language in the Federal Lease indicates that the dam will be used for water conservation purposes, the lease contains no language prohibiting such a use. The subordination clause, giving the government the right to flood the land permanently or intermittently, is unrestricted as to purpose. Considering these clauses together, we hold that the Federal Lease unambiguously releases the government from any liability for flooding of the land by operation of the dam for any purpose.

Thus, there was no justification to resort to parol evidence of the parties' intentions. Beta Sys., Inc. v. United States, 838 F. 2d 1179, 1183 (Fed. Cir. 1988). Accordingly, the CFC's reliance on Bistline, which is binding precedent for us, is not misplaced. In Bistline, the government had a flowage easement with an accompanying release which stated:

The Grantors . . . do hereby

> release the United States of America, and its assigns, from all claims for damages that have accrued or may hereafter accrue to any or all of the above described lands by reason of the overflow of water occasioned by the construction and operations of the said [project] . . . .

640 F. 2d at 1273. The then Court of Claims concluded that this comprehensive release was "complete and unambiguous" and, therefore, the parol evidence rule barred consideration of the parties' understanding of the agreement. The release here is equally complete and unambiguous. Therefore, the CFC correctly barred evidence of the parties' intent.

II. The SARDCO Lease

Appellants also argue that under the SARDCO lease they raised a material fact issue precluding summary judgment: whether

by changing its operational policy with respect to the Prado Dam, the government placed a greater servitude upon the SARDCO property than allowed by the 1944 flowage easement. The language of the 1944 condemnation action grants the government "a perpetual easement to flood and inundate any or all of [the SARDCO land] intermittently as may be required from time to time, incidental to the successful operation and maintenance of the Prado Flood Control Basin for controlling storm water run-off . . . ." Appellants argue that the easement is restricted to controlling storm water run-off. Therefore, the alleged change in use of the dam to water conservation purposes exceeds the scope of the easement and effectuates a taking of appellants' rights under the lease.

The SARDCO lease, however, is subject not only to the 1944 government flowage easement, but also to a 1967 condemnation

action by the Orange County Water District (OCWD). Although the 1944 flowage easement is arguably limited in purpose to operation of the dam for control of storm water run-off, the 1967 condemnation action was specifically made "to augment the water supplies of the [OCWD] and the conservation of water within and outside said District." Even if appellants could show that the government began using the dam for water conservation purposes, such use was clearly permissible under the 1967 condemnation action. Therefore, any argument that appellants may have had that the government exceeded the scope of the 1944 easement was mooted by the 1967 condemnation action. Moreover, these conditions prevailed when appellants acquired their rights under the SARDCO lease in 1982. Accordingly, whether or not the government used the dam for water conservation purposes is irrelevant and presents no material fact issue.

Appellants' argument that they retained surface rights in the SARDCO land also fails. The 1967 condemnation action transferred title to the land in fee simple to the OCWD, subject to the 1944 government flowage easement and excepting the rights under the lease to "all oil, gas, petroleum and other hydrocarbon substances in or under or which may be produced from said land which underlies a plane parallel and 500 feet below the present surface of said land and the right of prospecting for, the exploration, development, production, extraction, and taking of said oil, gas, petroleum and other hydrocarbon substances from said land." (emphasis added). The unambiguous language of the condemnation order transferred to Orange County all title to the surface rights. Therefore, even though the 1967 condemnation order further specified a right of surface entry and use of said land for exploration and production

in connection with the mineral rights and for access to the drilling platforms, this provision did not convey actual ownership of a "surface right," which would conflict with OCWD's and the government's right to flood the land at will for water conservation purposes.

Because appellants have failed to show that they retained surface rights in the SARDCO property or that there was a material fact issue, we conclude that the government is entitled to summary judgment as a matter of law.

III.

We have considered appellants other arguments and find them unpersuasive. In view of our holding, we need not reach the government's statute of limitations argument.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5070

RICHARD E. BACHTEL, RICHARD G. MILHAM, PRADO PETROLEUM CO., SANTA FE INTERNATIONAL CORPORATION; DONALD C. WINKLER, ROSS O. NELSON, PARA LOS NINOS; PLAZA DE LA RAZA; UNIVERSITY OF SOUTHERN CALIFORNIA,

and

SANTA ANA VALLEY IRRIGATION COMPANY,

Plaintiffs-Appellants,

v.

DAVID MURDOCH d/b/a/ PACIFIC AMERICAN OIL COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant-Appellee.

O R D E R

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, with a notice of joinder by Santa Ana Valley Irrigation, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc, joinder, and response having been referred to the circuit judges who are regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same thereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on December 23, 1993.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

By
Diane F. Frye
Chief Deputy Clerk

Dated: December 16, 1993

cc: RONALD K. VAN WERT
PETER A. APPEL
STEPHEN J. MEYER

BACHTEL V. US, 93-5070
(CFC - 674-88L)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. it is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5070

RICHARD E. BACHTEL, RICHARD G. MILHAM, PRADO PETROLEUM CO., SANTA FE INTERNATIONAL CORPORATION; DONALD C. WINKLER, ROSS O. NELSON, PARA LOS NINOS; PLAZA DE LA RAZA; UNIVERSITY OF SOUTHERN CALIFORNIA,

and

SANTA ANA VALLEY IRRIGATION COMPANY,

Plaintiffs-Appellants,

v.

DAVID MURDOCH d/b/a/ PACIFIC AMERICAN OIL COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 674-88L

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED.

ENTERED BY ORDER OF THE COURT
FRANCIS X. GINDHART, Clerk

Dated: OCT. 6, 1993

COSTS: Against, Appellant.

PRINTING----------$351.09

TOTAL----------$351.09

ISSUED AS A MANDATE: December 23, 1993

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 674-88 L

RICHARD BACHTEL, et al.,

Plaintiffs

PARA LOS NINOS, et al.

Third Party Plaintiffs,

ROSS O. NELSON,

Third Party Plaintiff,

v.

THE UNITED STATES

JUDGMENT FILED NOVEMBER 25, 1992

Pursuant to the court's opinion of November 23, 1992, granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaints are dismissed. No costs.

David A. Lampen
Clerk of Court
By: Deputy Clerk

November 25, 1992
NOTE: As to appeal, 60 days from this date, see RUSCC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 674-88 L

Filed: (November 23, 1992)

* * * * * *		
RICHARD BACHTEL, et al.,	*	
Plaintiffs	*	THIS OPINION
PARA LOS NINOS, et al.	*	WILL NOT BE
Third Party Plaintiffs,	*	PUBLISHED IN THE
ROSS O. NELSON,	*	UNITED STATES
Third Party Plaintiff,	*	CLAIMS COURT
v.	*	REPORTER
THE UNITED STATES OF AMERICA,	*	
	*	
Defendant.	*	
* * * * * *		

Ronald K. Van Wert, Newport Beach, California, for plaintiffs and third-party plaintiffs.

Brian S. Currey, Los Angeles, California, for plaintiff David Murdoch d/b/a Pacific American Oil Company, and for

plaintiff Santa Ana Valley Irrigation Company.

Dorothy R. Burakreis, United States Department of Justice, Washington, D.C., for defendant.

OPINION

HODGES, Judge

This case presents the issue whether defendant infringed on plaintiffs' property rights.

We grant defendant's motion for summary judgment.

FACTS

1. Background

The Flood Control Act of 1936 authorized the construction of Prado Dam on the Santa Ana River for the purpose of protecting the metropolitan area of Orange County, California. Completed in 1941, the dam captures rainfall-runoff, storing the water and releasing it at lesser flow rates to prevent damage to the land. Orange

County Water District (Orange County) takes advantage of the controlled releases by diverting the river into a large groundwater basin that provides water during times of drought or water shortage.

2. The Federal Property

In 1965, the Bureau of Land Management issued an oil and gas lease on approximately 195 acres in the Prado Basin. This lease included a stipulation which provided that "all rights under this lease are subordinate to the rights of the United States to flood and submerge the lands, permanently or intermittently in connection with the operation and maintenance of the Prado Flood Control Basin Project." The stipulation also contained a "hold harmless" clause that freed the United States from responsibility for damages or injuries "arising from or incident to flooding of the said premises by the Government or flooding from any other cause, or arising from or incident to any

other Governmental activities . . ."

3. The SARDCO Property

In 1967, Orange County condemned the surface rights to a separate tract of land in the Prado Basin adjacent to the federal land containing the oil and gas leasehold. This land was owned by the Santa Ana River Development Company (SARDCO), which was left with the sub-surface mineral rights. The condemnation order stated that the property was taken to "augment the water supplies of the Orange County Water District and the conservation of water within and outside said District."

After condemnation proceedings, Orange County owned the surface rights to the SARDCO lands in fee, subject to a flowage easement which had been obtained by the United States in 1944. The flowage easement gave the United States the right "to prohibit human habitation, and [gave it] a perpetual easement to flood and inundate any

or all of said Parcels . . . intermittently as may be required from time to time, incidental to the successful operation and maintenance of Prado Flood Control Basin for controlling storm water run-off . . . ."

4. Prado Petroleum

Plaintiffs in this case own, lease, or hold royalty interests in the sub-surface mineral rights on the SARDCO property and the federal property. Prado Petroleum Company (Prado) is lessee of the sub-surface mineral rights on both properties.

Prado bought a 100% working interest in the federal lease and the SARDCO lease for $387,500 in August 1982. It operates three oil wells on the federal property and ten oil wells on the SARDCO property. Prado claims that in November 1982, the United States Army Corps of Engineers began to operate Prado Dam for water conservation purposes in addition to the stated purpose of flood control. Prado alleges that this

operation flooded its oil wells from December 1982 to June 1983, causing substantial damage to plaintiffs' property. Plaintiffs argue that the reservation of rights in the federal lease and the flowage easement over the SARDCO property do not authorize water conservation uses. They assert that the United States is liable for damaging their property by breaching the federal lease and by exceeding the flowage easement under one of two theories: (1) breach of contract, or (2) "taking."

To prevail under either theory, plaintiffs must show that defendant infringed upon their property interests. We hold that defendant did not.

DECISION

1. The Federal Lease

The Bureau of Land Management oil and gas lease provided, "All rights under this lease are subordinate to the rights of the United States to flood and submerge the

lands, permanently or intermittently . . . ." Nonetheless, plaintiffs seek damages for flooding because of uses for the dam that allegedly were not contemplated by the parties.

The Court of Claims held that a plaintiff could not launch what amounted to a collateral attack by introducing parol evidence concerning its understanding of the unequivocal language of an easement acquired twenty-eight years earlier. Bistline v. United States, 640 F. 2d 1270, 1275 (Ct. Cl. 1981). This case is similar. Plaintiffs ask the court to consider the understanding of the parties to an oil and gas lease in 1965, to prove that the United States has changed its policy regarding the operation of Prado Dam. Plaintiff Prado would have us determine the meaning of the lease agreement it signed in 1982 by ascertaining the understanding of "other landowners and other times." Bistline, 640 F. 2d at 1275. The

parol evidence rule bars consideration of their alleged understanding to interpret the unambiguous language of the agreement. Bistline, 640 F. 2d at 1274.

Plaintiffs argue that a special stipulation in the federal lease regarding the planned use of the Prado Basin for recreational purposes creates an ambiguity. The stipulation states, "Wells shall not be drilled in locations which will interfere with the planned future recreational development facilities . . . . " If Prado believed that the stipulation was patently ambiguous, it was obligated to determine the meaning of the language before entering into a binding contract. Newsom v. United States, 676 F. 2d 647, 649 (Ct. Cl. 1982). If the stipulation were a latent ambiguity, then Prado would have to show that it relied upon its interpretation of the language. Lear Siegler Management Services v. United States, 867 F. 2d 600, 603 (Fed. Cir. 1989).

Prado's president, George Brayton, testified in a deposition that he did not examine the oil and gas leases prior to bid award. He knew the leases provided for flooding, but he did not inquire as to the frequency or duration of the flooding before his purchase. The annual reports of the California Division of Oil and Gas are public records and they show that the oil wells were essentially out of production during the four and one half years prior to Prado's purchase, due to flooding. Mr. Brayton did not examine these records.

Mr. Brayton cannot show that he was misled by an ambiguity in the lease because he did not examine the lease prior to closing. In fact, the federal lease explicitly gave the United States the right to flood the land permanently or intermittently, and stated that all rights under the lease were subordinate to this right.

The lease also contained a hold harmless clause that released defendant from damages as a result of flooding from any Government activities. This clause is broad, and it embraces water conservation as a Government activity. The language of the lease is complete and unambiguous, and the hold harmless clause is couched in comprehensive terms. Under these circumstances, the parol evidence rule forbids the consideration of other evidence. Bistline, 640 F. 2d at 1274.

2. The SARDCO Lease

The SARDCO lease incorporates by stipulation the condemnation judgment obtained by Orange County for the stated purpose of water conservation. The Government's flowage easement on the SARDCO land provided for flooding from storm run-off. However, plaintiffs assert that flooding has exceeded the scope of the easement, resulting in an increased burden

on Prado's oil wells. They focus on the anticipated operation of the dam, relying on Narramore v. United States, 852 F. 2d 485 (9th Cir. 1988). In that case, the plaintiffs' argument that flooding of their property exceeded the scope of flowage easements was dismissed on summary judgment. The appeals court held that plaintiffs had raised a factual issue of "whether they have suffered greater flooding than that which would have been caused by [the dam's] anticipated operation." Narramore, 852 F. 2d at 491.[1]

In the present case, plaintiffs have not raised a factual issue regarding the flowage easement. Defendant offered a compilation of official Corps of Engineers records showing that plaintiffs' wells were submerged only sixteen percent of the time

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[1]Upon remand, the case was ordered transferred to the Claims Court by the Court of Appeals for the Federal Circuit. Narramore v. United States, 960 F. 2d 1048 (Fed. Cir. 1992).

between August 1982 and July 1992. Plaintiffs dispute this figure, but have not produced specific facts to support another finding which would raise a factual issue.

CONCLUSION

Summary judgment may be granted where there are no genuine disputes as to any material fact. A party opposing summary judgment must show specific facts demonstrating a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Plaintiffs have not shown a genuine issue of fact, and they have not shown ambiguities in the leases that would preclude application of the parol evidence rule. For these reasons, defendant's motion for summary judgment is GRANTED. The Clerk is directed to enter judgment dismissing the complaint. No costs.

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

ORANGE COUNTY WATER DISTRICT, a public corporation,	)	No. 76620
Plaintiff,	)	FINAL ORDER OF CONDEMNATION WITH DIRECTIONS TO PAY DEPOSIT TO DEFENDANTS
v.	)	
SANTA ANA RIVER DEVELOPMENT COMPANY, a Nevada corporation; SANTA ANA VALLEY IRRIGATION COMPANY, a California corporation; ANAHEIM UNION WATER COMPANY, a California corporation; DOE I, DOE II, DOE III, DOE IV, DOE V, BLACK, INC., a corporation; and WHITE, INC., a corporation,	)	FILED JUNE 28, 1967 DONALD D. SULLIVAN, Clerk
Defendants.	)	

Judgment in condemnation having been made and granted on June 28, 1967, by this Court, and it appearing to the satisfaction of this Court that the above named plaintiff, pursuant to that judgment, has

paid into Court for the defendants, SANTA ANA RIVER DEVELOPMENT COMPANY, SAVI DEVELOPMENT CO., INC., SANTA ANA VALLEY IRRIGATION COMPANY, and ANAHEIM UNION WATER COMPANY, the initial sum of $1,800,000.00 to be disbursed to said defendants as their interests appear and as hereinafter ordered.

IT IS ORDERED, ADJUDGED AND DECREED that the fee simple title to the real property more particularly hereinafter described, subject to a perpetual easement in favor of the United States of America as acquired by decree in condemnation dated February 11, 1944, in the District Court of the United States in and for the Southern District of California, Central Division in the case of United States of America, Plaintiff, vs. Certain Parcels of Land in the Counties of San Bernardino and Riverside, et al, Defendants, Action No. 886-O.C. Civil and excepting from said real property the rights reserved by paragraph 2

and subject to the leases described in paragraph 3 of the Stipulation filed herein June 5, 1967, is hereby condemned to and taken for the public use stated in the Complaint herein, to wit, to augment the water supplies of the ORANGE COUNTY WATER DISTRICT and the conservation of water within and outside said District.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the sum of $1,800,000.00, together with costs in the sum of $24.00 paid into Court, be paid forthwith to the aforesaid defendants as their interests appear as follows: One-twelfth (1/12th) thereof or the sum of $150,002.00 to SANTA ANA RIVER DEVELOPMENT COMPANY; one-twelfth (1/12th) thereof or the sum of $150,002.00 to SAVI DEVELOPMENT CO., INC; five-twelfths (5/12ths) thereof or the sum of $750,010.00 to SANTA ANA VALLEY IRRIGATION COMPANY; and five-twelfths (5/12ths) thereof or the sum of $750,010.00 to ANAHEIM UNION WATER

COMPANY.

The real property referred to by this Decree and the title to which is hereby vested in plaintiff herein is more particularly described as follows, to wit:

PARCEL 1. [Legal description omitted]

PARCEL 2. [Legal description omitted]

PARCEL 3. [Legal description omitted]

PARCEL 4. [Legal description omitted]

PARCEL 5.

All rights reserved by defendants pertaining to Lot 2 of Santa Ana River Development Company Tract in that certain Agreement with Altfillish Construction Co., a California corporation, dated October 30, 1962 and reserved by defendants in the deed of conveyance of said Lot 2 to said Altfillish Construction Co.

ALL SUBJECT TO the rights of the United States of America in and to said real property acquired by Decree in Condemnation dated February 11, 1944, in the District

Court of the United States in and for the Southern District of California, Central Division in the case of United States of America, Plaintiff, vs. Certain Parcels of Land in the Counties of San Bernardino and Riverside, et al, Defendants, Action No. 886 - O.C. Civil.

ALSO SUBJECT TO that certain lease dated May 24, 1962, amended effective February 18, 1963 between Santa Ana River Development Company and Charles I. Iselin, and the lease dated February 1, 1955 and amended May 8, 1962 by and between the defendants herein and Roland Reynolds.

RESERVING AND EXCEPTING from that portion of the hereinabove described real property located within Sections 17 and 20 and a portion of Sections 16 and 21, Township 3 South, Range 7 West, San Bernardino Base and Meridian, as shown on Exhibit "A" attached hereto and designated thereon as "Area Retained" all oil, gas

petroleum and other hydrocarbon substances in or under or which may be produced from said land which underlies a plane parallel to and 500 feet below the present surface of said land and the right of prospecting for, the exploration, development, production, extraction, and taking of said oil, gas, petroleum and other hydrocarbon substances from said land upon the conditions:

A. That the right of surface entry and use upon said land:

(1) for the exploration, development, production, extraction, taking and storage of said oil, gas, petroleum and other hydrocarbon substances underlying said land shall be limited to no more than eight (8) drilling areas or islands, each of which shall not exceed two (2) acres in surface area at 516 foot elevation, located approximately as shown on the drawing attached hereto marked Exhibit "A" and designated thereon as "Drilling Island";

provided, however, nothing contained herein shall be deemed to prohibit such exploration, development, production or extraction from natural surface levels within said drilling areas or islands.

(2) for road access or ingress and egress to and from said drilling areas or islands and for pipelines to and from the same, such rights of way over and across said land and land of plaintiff adjacent thereto as shall be reasonably necessary thereto and approved in writing by plaintiff or its successor in interest; provided, however, that any existing roadway or roadways hereafter constructed will be used for such ingress and egress whenever possible.

B. No sumps, ditches, or open surface storage shall be constructed or used upon said land for the deposit, storage, flowage or transportation of oil, petroleum, hydrocarbon substances of any kind, any

drilling fluid, water or other material from the wells; nor shall such oil, petroleum, hydrocarbon substances, drilling fluid, or other materials from the wells be discharged, flowed or in any manner deposited upon, over or across said land or into any water which may at any time be impounded upon said land; nor shall the same be injected into any potable water bearing aquifers underlying said land.

C. Upon the expiration and termination of that certain oil and gas lease made and entered into contemporaneously herewith by and between Santa Ana River Development Company, a corporation, Santa Ana Valley Irrigation Company, a corporation, and Anaheim Union Water Company, a corporation, party of the first part, therein styled "Lessor," and Prado-Corona Company, a limited partnership, therein styled "Lessee", and thereafter at such time as oil, gas, petroleum or

hydrocarbon substances shall cease to be produced from said land in paying quantities for a period of one year, then and in that event, this reservation and exception shall cease and shall thereupon become null and void. The interest of defendants shall thereupon vest in plaintiff and said defendants, their successors and assigns, shall have no further interest in and to the land or any part thereof. Upon the happening of said event, defendants, their successors and assigns, shall execute and deliver to plaintiff a good and sufficient quitclaim deed to said land. "Paying quantities" as used herein, is defined to mean such quantities of oil, gas, petroleum, or other hydrocarbon substances as would lead to a reasonable expectation of profit on the entire sum, including drilling and producing costs, to be expended in the prosecution of the enterprise.

Done in open court this 28th day of

June, 1967.

S. Thomas Bucciarelli
Judge of the Superior Court

Entered
June 28, 1967
Judgment Book 114,
PG 679

[Exhibit "A" omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF

CALIFORNIA

CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	No. 886-0'C Civil
Plaintiff,	)	FINAL JUDGMENT AND DECREE IN CONDEMNATION
v.	)	
CERTAIN PARCELS OF LAND IN THE COUNTIES OF SAN BERNARDINO AND RIVERSIDE, STATE OF CALIFORNIA; SANTA ANA RIVER DEVELOPMENT COMPANY, a corporation; ANAHEIM UNION WATER COMPANY, a corporation; SANTA ANA VALLEY IRRIGATION COMPANY, a corporation; et al.	)	(As to Parcel 1, also known as E.O. 42-55, 136, 138, 140, Parcel 2, also known as E.O. 269, Parcel 3, also known as E.O. 268, and Parcel No. 4, also known as E.O. 312)
Defendants.	)	

Interlocutory Judgment pertaining to Parcels Numbers 1, also known as E.O. 42-55, 137, 138, 140; 2, also known as E.O. 269; 3 also known as E.O. 268 and 4, also known as E.O. 312, having heretofore and on the 6th day of October, 1943, been duly made, and on

the 6th day of October, 1943, entered in the above entitled action, and such Interlocutory Judgment having awarded the sum of Seventy-Four Thousand four Hundred Thirty-three and 33/100 Dollars ($74,433.33) as the fair, just and adequate compensation for the condemnation and taking by plaintiff of all of the hereinafter described rights in and to the above numbered parcels, and said Interlocutory Judgment further providing that upon payment into the registry of the Court of said sum, the hereinafter described rights in and to said parcels should be condemned to the use of, and title thereto should be divested out of the above named defendants, and vested in the plaintiff; and

It appearing that on the 22nd day of January, 1944, plaintiff deposited with the Clerk of the United States District Court for the Southern District of California, the sum of Seventy-four Thousand Four Hundred Thirty-three and 33/100 Dollars ($74,433.33)

pursuant to the said Interlocutory Judgment;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That on the 22nd day of January, 1944, there vested in the United States of America, its successors or assigns, title to the following described rights in and to said parcels, to wit: The right to prohibit human habitation, and a perpetual easement to flood and inundate any or all of said Parcels Numbers 1, 2, 3, and 4 intermittently as may be required from time to time, incidental to the successful operation and maintenance of the Prado Flood Control Basin for controlling storm water run-off, subject to the rights and interests of the County of San Bernardino and County of Riverside, existing by virtue of easements for street and highway purposes, providing, however, that the grantors, defendants herein, their heirs, successors and assigns may continue to own and enjoy

such rights as are now owned and enjoyed by the said defendants, subject however, and subordinate to the described rights herein acquired by the plaintiff.

2. Said parcels are more particularly described as follows:

[Legal description omitted]

3. That this Court retains jurisdiction of this proceeding for the entry of such further orders and decrees as the Court may deem proper.

DATED: This 11th day of February, 1944.

J. F. T. O'Connor
United States District Judge

Presented by:
IRL D. BRETT
Special Assistant to
the Attorney General
THOMAS J. CLARK
Special Attorney
Lands Division
Department of Justice
By Irl D. Brett
Attorneys for Plaintiff

ENDORSED: FILED
FEB 11 1944
Edmund L. Smith, Clerk
By Francis E. Cross,
Deputy Clerk

Judgment entered Feb 11, 1944
Docketed Feb 11, 1944
Book 23, page 365
Edmund L. Smith, Clerk
By Francis E. Cross, Deputy

Feb 12, 1944
A TRUE COPY, ATTEST, ETC.
EDMUND L. SMITH, Clerk U.S. District Court,
Southern District of California.
C.A. Simmons, Deputy
(U.S. DISTRICT COURT SEAL)